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Prisoner-assisted homicide – more 'volunteer' executions loom

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When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence, he does not ask the State to permit him to take his own life. Rather, he invites the State to violate two of the most basic norms of a civilized society – that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified.

United States Supreme Court Justice, 1990[1]

Robert Comer, Christopher Newton and Elijah Page have something in common, aside from being on death row in the USA. Each of these three men is assisting their government in its efforts to kill them. They have given up their appeals and are "volunteering" for execution. Robert Comer is scheduled for execution in Arizona on 22 May 2007, Christopher Newton in Ohio on 23 May, and in the week of 9 July Elijah Page is due to become the first person to be put to death in South Dakota since 1947. In addition, on 4 May 2007, the Tennessee Attorney General requested an execution date for Daryl Holton, a former soldier with a history of depression, who has effectively waived his appeals and has been found competent to do so.

The execution of another "volunteer", Carey Dean Moore, due to be carried out in Nebraska on 8 May 2007, was stopped by the state Supreme Court on 2 May in view of concerns – not raised by Moore – about Nebraska's use of the electric chair. In issuing its order, a divided Court noted that the "unique problem presented by this case is that Moore has not asked for a stay." It added, however, that "we simply are not permitted to avert our eyes from the fairness of a proceeding in which a defendant has received the death sentence", and that "we have authority to do all things that are reasonably necessary for the proper administration of justice".[2] It seems that not all courts have adopted such a view, and "volunteers" have gone to their deaths despite concerns about the fairness of proceedings that

[1] *Whitmore v. Arkansas*, 495 U.S. 149 (1990), Justice Marshall dissenting.
[2] *State of Nebraska v. Carey Dean Moore*, Supreme Court of Nebraska, 2 May 2007.

put them on death row or about the reliability of determinations that found them competent to waive their appeals.

About one in 10 of the men and women put to death in the USA since judicial killing resumed there in 1977 had given up their appeals. Outside of the five main executing states of Texas, Virginia, Oklahoma, Missouri and Florida, this figure rises to one in five for the remaining 28 jurisdictions that have executed since 1977. Four of the first five executions in the USA after 1977 were of "volunteers". Put to death by firing squad, electrocution, and gas, perhaps their personal pursuit of execution made it easier for the USA to stomach a return to a punishment that much of the rest of the world was beginning to abandon.

Fourteen US states, and the federal government, resumed executions after 1977 with the killing of a prisoner who had waived his appeals. Five of the states which have resumed executions, Connecticut, Idaho, New Mexico, Oregon and Pennsylvania, have yet to execute a "non-volunteer". In other words, if the eight inmates who have been put to death there had not given up their appeals, these five states would likely not yet have resumed executions. Twenty of the 27 executions so far carried out in Kentucky, Montana, Nevada, Utah and Washington have been of prisoners who waived their appeals (see table at end of report).

Race and mental health appear to be the strongest predictors of who will waive their appeals – most "volunteers" are white males (as are the five prisoners featured in the second half of this report), and many have a history of mental disorders.[3] Nevertheless, a review of such cases suggests that any number of factors may contribute to a prisoner's decision not to pursue appeals against their death sentence, including mental disorder, physical illness, remorse, bravado, religious belief, a quest for notoriety, the severity of conditions of confinement, including prolonged isolation and lack of physical contact visits, the bleak alternative of life imprisonment without the possibility of parole, pessimism about appeal prospects, or being worn down by the cycle of hope and despair generated by winning and then losing appeals. [4]

Death row conditions in the USA have become increasingly harsh over the years, with inmates spending more time in isolation. As one recent study of "volunteers" has pointed out, "in virtually every state, death row inmates are 'locked down' in their cell for most of the day, have little or no access to educational or other prison programs and experience great isolation and loss of relationships".[5] Such relationships include those with fellow inmates who may leave death row through a successful appeal or because they die, including at the hands of the state executioners.

[3] Few women are sentenced to death and executed in the USA (between 98 and 99 per cent of death row inmates and those executed in the US are male). However, of the 11 women who have been put to death, three had waived their appeals (27 per cent). All three were white.
[4] For example, see: *USA: The illusion of control – 'Consensual' executions, the impending death of Timothy McVeigh, and the brutalizing futility of capital punishment.* AI Index: AMR 51/053/2001, April 2001, http://web.amnesty.org/library/index/engamr510532001.
[5] *Killing the willing: 'volunteers', suicide and competency*, by John H. Blume, Cornell Law School, Legal Studies Research Paper Series, No. 04-022, September 2004.

David Dawson was executed in Montana in 2006 after two decades on death row. His lawyers argued that his decision to waive his appeals and fire them had been influenced by the harsh conditions on Montana's death row and the suicides of two other condemned inmates who hanged themselves in their cells in July 2003 and February 2004. In Robert Comer's case, his close friend, Robert Vickers, whom he had met on Arizona's death row, was executed in 1999. In evaluating Comer's continuing decision to waive his appeals, a psychiatrist found that in the weeks after the execution of Vickers, Robert Comer "had no interest in anything. He had no pleasure in anything. He spent most of the time in his bunk. Contrary to his usual pattern of walking 14 to 20 hours a day in his cell…, he didn't walk much at all. He expressed great sadness and he was in deep depression."[6]

A condemned inmate's decision to waive his or her appeals may simply stem from a desire to gain a semblance of control over a situation in which they are otherwise powerless. As the US Supreme Court recognized over a century ago, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it…, as to the precise time when his execution shall take place."[7] One way for a prisoner to end this cruel uncertainty is to ask to be killed by the state.

In order to "volunteer" for the death penalty, an individual only has to be found competent to do so. The test which some courts in the USA use to determine competency to waive appeals is based on a 1966 US Supreme Court decision and is "whether [s/]he has the capacity to appreciate his [/her] position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether [s/]he is suffering from a mental disease, disorder, or defect which may substantially affect his [/her] capacity…".[8] If a condemned inmate is found incompetent to waive his or her appeals – a rare event – someone found to have legal standing as a "next friend" may pursue litigation on their behalf.[9]

Issues of mental illness aside, what amounts to a "rational" choice in this regard? If a prisoner is threatened with death at gunpoint during an interrogation, is it not "rational" for that prisoner to say what he or she thinks the interrogator wants to hear? It does not mean the statement is voluntary. In the case of a prisoner condemned to death, he or she "must inevitably experience extraordinary mental anguish".[10] Is it not "rational" for such a prisoner to escape a process which "is often so degrading and brutalizing to the human spirit as to constitute psychological torture"?[11] As has been said,

> "the 'realities' of life on death row convey to the prisoner such a resounding message that no 'spoken words' of coercion need be expressed. Through the daily indignities

[6] *Comer v. Stewart*. Amended opinion, US District Court for the District of Arizona, 16 October 2002.
[7] *In re Medley*, 134 U.S. 160 (1890).
[8] *Rees v. Peyton*, 384 U.S. 312 (1966).
[9] See *Whitmore v. Arkansas* (1990). A state court's finding that an inmate is competent to waive their appeals is entitled to a presumption of correctness (*Demosthenes v. Baal*, 1990).
[10] *Furman v. Georgia*, 408 U.S. 238 (1972), Chief Justice Burger, dissenting (joined by Justices Blackmun, Powell and Rehnquist).
[11] *People v. Anderson*, Supreme Court of California (1972).

> both big and small, the near total isolation which extends for years, the absence of virtually all activities, and other brutal conditions, the death row prisoner is 'told' he is worthless and should be and will be dead. The 'choice' presented by the State is to die now or continue to be punished for challenging the State's decision by the harsh regimes reigning on death row".[12]

Rational or irrational, can a decision taken by someone who is under threat of death at the hands of others be truly voluntary? Even if it were, there is no disguising the fact that the state is pursuing a killing that is at least as calculated, and in all likelihood more so, as any murder for which the condemned inmate is being punished.

Suicidal ideation seems to motivate the decision-making of some such inmates. William Downs, for example, had a history of depression and suicide attempts from the age of 10. He also attempted suicide while in pre-trial custody for the capital murder of a six-year-old boy in 1999. He pleaded guilty at his 2002 trial and refused to allow mitigation evidence to be presented on his behalf, including of his abusive childhood at the hands of his father. After he was sentenced to death, he waived his appeals. At a hearing, a forensic psychiatrist testified that she could not offer an opinion on Downs' competence to drop his appeals, instead suggesting that he should be treated for his depression to see if that would cause him to change his mind. The judge ruled that, while such a suggestion was well-intentioned, a delay was unnecessary for the court to reach its opinion. The judge ruled that William Downs did not have a current desire to commit suicide, but that he preferred execution to imprisonment. William Downs was put to death in South Carolina on 14 July 2006.

With such cases in mind, the execution of "volunteers" is often compared to state-assisted suicide. However, "prisoner-assisted homicide" may be a more appropriate description of this phenomenon. Notably, for example, in the leading death penalty state of Texas, "homicide" – the killing of one human being by another – was the cause of death given on the death certificates of the nearly 350 prisoners executed between December 1982 and September 2005, including the 25 who had given up their appeals and "consented" to execution during this period.[13] Moreover, if a death row inmate attempts to pre-empt the executioner by committing actual suicide, the state will make every attempt to prevent it.[14]

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[12] G. Richard Strafer, *Volunteering for execution: competency, voluntariness and the propriety of third party intervention.* The Journal of Criminal Law & Criminology, Vol 74, No 3 (1983), p. 887-8.

[13] Under Texas legislation that took effect on 1 September 2005, this death certificate entry was changed to "judicially ordered execution". Signing the bill into law, Governor Perry, whose term in office has now seen more executions than any other governorship, explained that executed prisoners "are not victims. They are criminals and the final document that bears their name should reflect this fact." *Gov. Perry Signs Life Without Parole Bill*, 17 June 2005. Press release, Office of the Governor, http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-06-17.2331/view

[14] For example, Robert Brecheen attempted suicide a few hours before his execution in Oklahoma in August 1995. He was rushed to hospital to have his stomach pumped, then taken to the execution chamber and killed. In Texas in April 1997, David Lee Herman slashed his wrists before his execution. He was treated and then put to death. David Long attempted suicide by drug overdose two days before he was due to be executed in Texas on 8 December 1999. He was still in intensive care in hospital in Galveston, about 200 kilometres from the Texas death chamber, as his scheduled execution

Gary Gilmore, for example, whose execution by Utah firing squad on 17 January 1977 opened the "modern" era of judicial killing in the USA, was twice hospitalized in intensive care after overdosing on drugs on death row. He had spent only three months on death row, fighting all attempts to stop his execution, including by his mother. The chief forensic psychiatrist at Utah State Hospital theorized that Gary Gilmore

> "went out of his way to get the death penalty; that's why he pulled two execution-style murders he was bound to be caught for. I think it's a legitimate question, based on this evidence and our knowledge of the individual, to ask if Gilmore would have killed if there was not a death penalty in Utah".[15]

The cases of some other individuals executed since then indicate that not only were they not deterred by the death penalty, but that the punishment actually motivated their crime.[16]

In any event, while some prisoners give up their appeals after years on death row, the death wish of others precedes their trials. Their unwavering pursuit of execution suggests that for them, far from being the deterrent some politicians claim[17], the death penalty represents a form of escape, whether from the torments of their lives, their crimes, or their minds. Christopher Swift was executed in Texas on 30 January 2007 after giving up his appeals against his death sentence for the April 2003 murder of his wife and mother-in-law. According to one of his trial lawyers, "receiving the death penalty is what he's wanted from day one, from the first day I met him."[18] Swift had prevented his lawyers from presenting any witnesses at his 2005 trial. He waived his right to a lawyer for his automatic mandatory appeal, and when the death sentence was affirmed, asked for an execution date to be set.

Darrell Ferguson had a history of mental health problems and suicide attempts. Before his murder trial in 2003, he wrote to the judge and prosecutor. In a letter to the prosecutor, Ferguson admitted his guilt and expressed his wish to "get this over with as soon as possible…Darrell Wayne Ferguson wishes to seek the death penalty." In a letter to the judge, he wrote: "I have no Remorse for what I did", and asked "in my right state of mind

approached. Long was flown by aeroplane to Huntsville, accompanied by a full medical team to ensure his safe arrival. He was then put to death.

[15] See Strafer, *Volunteering for execution, op. cit.*, p. 866. "Gilmore served more than half of his life behind bars, including eighteen of his last twenty-one years. He was last serving time in Oregon, a state that did not have the death penalty [it was reenacted there in 1978], when he was paroled prior to the incident resulting in his death penalty and execution. He chose to be paroled in Utah, a state with the death penalty…"

[16] For example, see cases of Thomas Akers and Daniel Colwell, pages 113-115, *USA: The execution of mentally ill offenders*, AI Index: AMR 51/003/2006, January 2006, http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File/AMR5100306.pdf.

[17] At a press conference in 2005, President George W. Bush was asked about whether his support for executions had changed at all since leaving the Texas governorship. The President replied: "No. I still support the death penalty, and I think it's a deterrent to crime." President's press conference, 16 March 2005, available at http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html.

[18] *Texas executes man for killing 2.* Associated Press, 30 January 2007.

would you please Find it in good will to give me the Death penalty" [sic]. He subsequently pleaded guilty and waived his right to a jury trial. He waived the presentation of any mitigating evidence. Before he was sentenced, the defendant read out a letter to the court stating his lack of remorse, and that if he was freed back into society he would "pick up where I left off from and take the pleasure of causing destruction. I'm not afraid of death like some of you are". He was sentenced to death, waived his appeals, and was executed in Ohio's lethal injection chamber on 8 August 2006.

The death penalty appears to have held no deterrent value for Rocky Barton either. At his trial in 2003 for the murder of his wife, he refused to have any mitigating evidence presented to the jury. Instead, he told the jurors: "I strongly believe in the death penalty. And for the ruthless, cold-blooded act that I committed, if I was sitting over there, I'd hold out for the death penalty… That's the only punishment for this crime."

In its 2006 affirmation of Rocky Barton's death sentence on mandatory review, the Ohio Supreme Court rejected the argument that the trial judge should have inquired whether Barton was mentally competent to waive his right to present any mitigating evidence. The high court reached this conclusion by deciding that Barton's statement to the jury asking for the death penalty was mitigating evidence. Two of the Justices dissented. One wrote: "Our country's most creative writers of fiction would be hard-pressed to spin Barton's statement as evidence offered in mitigation. Yet a majority of this court unquestioningly accepts that it was." The Chief Justice wrote: "It is difficult to imagine more compelling indicia of incompetence" than a defendant asking to be executed, and accused the majority of applying "inverse logic" in order to interpret the statement as mitigating.

The US death penalty has consistently been shown to be marked by racial bias, with those who murder whites more likely to receive a death sentence than those who murder non-whites. In addition, blacks are disproportionately represented on death row in the USA.

Eighty-six per cent of executed "volunteers" were white (106 men and three women), compared to 53 per cent in the case of "non-consensual" executions. Given the rate of reversible error found in capital cases, the phenomenon of inmates waiving their appeals may, even if only marginally, be obscuring an aspect of racial disparity in the use of the death penalty. In other words, given that most "volunteers" are white, if they had have pursued their appeals, some would have been successful, and fewer whites would have been executed.

Of the 1,076 people put to death in the USA since 1977, 15 were of whites convicted of killing only black victims. Three of these 15 executions (20 per cent) were of "volunteers". Some 215 African Americans have been executed for killing only white victims. Five of these prisoners (two per cent) were put to death after waiving their appeals.

In an interview on death row, in contrast to his assertion to the jury that he had committed a "ruthless, cold-blooded" murder, Rocky Barton recalled that the shooting was done on the "spur of the moment", and "was not planned, calculated, designed". He said that he had planned to kill himself in front of his wife, but had instead turned the gun on her. He then shot himself in the head, but survived. He was sentenced to death and waived his appeals. The state indisputably carried out a "planned, calculated, designed" killing when it executed Rocky Barton on 12 July 2006.

The issue of defendants who prevent their lawyers from presenting mitigating evidence is one that has only recently been considered by the US Supreme Court, and even then not head-on.[19] The case before it concerned that of Arizona death row inmate Jeffrey Landrigan who had refused to allow his lawyers to present the testimony of his former wife and his mother in mitigation at his murder trial. Asked by the trial judge if he would like to say anything on his own behalf, the defendant replied "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." He was sentenced to death. In 2006, the US Court of Appeals for the Ninth Circuit sent the case back to the federal District Court for an evidentiary hearing into whether his trial lawyer's failure to investigate mitigating evidence beyond the testimony of the two family witnesses he intended to present had prejudiced the outcome of the trial. Investigation by the lawyer, for example, would have revealed Landrigan's profoundly troubled childhood and the fact that he suffered from a serious organic brain disorder.

However, on 14 May 2007, in a split decision, the US Supreme Court overturned the Ninth Circuit ruling. The five Justices in the majority concluded that the District Court had not abused its discretion when it refused to grant Jeffrey Landrigan an evidentiary hearing "on his counsel's failure to present the evidence he now wishes to offer". The other four Justices dissented, arguing that "the Court's decision rests on a parsimonious appraisal of a capital defendant's constitutional right to have the sentencing decision reflect meaningful consideration of all relevant mitigating evidence, a bregrudging appreciation of the need for a knowing and intelligent waiver of constitutionally protected trial rights, and a cramped reading of the record". The four dissenters took issue with the majority's reasoning that Landrigan "would have" waived his right to introduce any mitigating evidence that his lawyer might have uncovered, and that such evidence "would have" made no difference to the sentencing outcome. "Without the benefit of an evidentiary hearing", the four wrote, "this is pure guesswork".[20]

Guesswork is in effect what the sentencing jury or judge is left to engage in if denied the ability to take mitigating evidence into account. Guesswork should have no place in deciding an irrevocable penalty.

David Kevin Hocker's murder trial in Alabama started and finished on the same day, 22 August 2000. Proceedings began at 9 o'clock in the morning and were completed before 5pm. The defence called no witnesses at either stage of the trial. Hocker had refused to allow his lawyer to present any mitigating evidence. The jury therefore never heard about Kevin Hocker's history of bipolar disorder or his abusive childhood. Nor did the jurors hear that his father, who also suffered from bipolar disorder (this illness can run in families), committed suicide when Kevin Hocker was eight years old. The father had been abusive to the children – Kevin Hocker's sister is reported to have been treated for post-traumatic stress disorder sustained as a result of the abuse. Kevin Hocker was first diagnosed with bipolar disorder as a

[19] *Schriro v. Landrigan*, US Supreme Court, 14 May 2007 ("Neither *Wiggins* [*v. Smith*] nor *Strickland* [*v. Washington*] addresses a situation in which a client interferes with counsel's effort to present mitigating evidence to a sentencing court. Indeed, we have never addressed a situation like this".
[20] *Schriro v. Landrigan*, Justices Stevens, Souter, Ginsburg and Breyer, dissenting.

teenager. His mother tried to get him help for his mental illness, but he would deny that he was ill. Instead, he took to self-medicating. Kevin Hocker was again diagnosed with bipolar disorder by a prison doctor when incarcerated in the 1990s, but he stopped taking his medication because he said that it was not helping. His sister has said that he told her that he committed the crime in order to get the death penalty. The jury voted for death. On death row, he engaged in acts of self-mutilation. He was found unconscious in his cell one day, having removed one of his testicles with a razor blade. A few months later, he removed the other. He refused to appeal his death sentence, and was executed on 30 September 2004.[21]

Some "volunteers" begin their pursuit of execution by firing their legal counsel.[22] At his December 2006 trial in Alabama, capital defendant Christopher Johnson fired his lawyers, admitted to killing his baby son, and asked for the death penalty. As the prosecutor put it, "the jury complied with Mr Johnson's wishes" and it recommended a death sentence.[23] Reminiscent of Robert Comer's case two decades earlier (see below), on the day of his sentencing in February 2007, Christopher Johnson reportedly refused to come out of his cell, and sat on the top bunk in his cell beating his head against a wall. Jail guards extracted him from his cell, using an electro-shock stun gun. He was showered, shackled to a wheelchair, and brought to the courtroom for sentencing. The judge said that he found a possible mitigating factor, namely a report that Johnson had been sexually abused as a child. Johnson responded that the report was untrue. The judge accepted the jury's recommendation, saying to Johnson "it is not my job to go into your mind and consider your motives" for dismissing his attorneys and seeking a death verdict.[24]

James Karis asked for the death penalty at his recent re-sentencing in California. Originally tried in 1982, in 2002 the Ninth Circuit Court of Appeals upheld a federal judge's 1998 decision to overturn his death sentence.[25] The federal judge had found that the jury might not have voted for a death sentence if it had heard the "substantial and wrenching" evidence of Karis' violent and abusive childhood, including at the hands of his father and stepfather. At his re-sentencing trial in 2007, the jury still did not hear that mitigating evidence because James Karis did not want them to. Karis fired his lawyers, who had investigated his background of abuse in preparation to present to the jury, and elected to represent himself instead. He refused to present any mitigating evidence and urged the jury to send him back to death row. The jurors complied with his wish, and on 25 April 2007 he was sentenced to death. Nevertheless, as the California Supreme Court stated in 1985:

[21] *USA: The execution of mentally ill offenders*, January 2006, *op. cit*., pages 87-88.
[22] In 1993, the US Supreme Court ruled that the competency standard for a defendant to waive his right to a lawyer or to plead guilty is the same as the competency standard for standing trial (Godinez v. Moran). In other words, once a defendant is found competent to stand trial – under the test he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him" – the defendant is, by definition, competent to waive counsel and to plead guilty.
[23] *Killer's death wish is granted*. Mobile Press-Register, 12 December 2006.
[24] *Atmore man asks for death sentence, and judge gives it to him*. Press-Register, 22 February 2007.
[25] *Karis v. Calderon*, US Court of Appeals for the Ninth Circuit, 18 March 2002.

> "To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated."[26]

Under the US Supreme Court's 1976 ruling, *Gregg v. Georgia*, allowing executions to resume after nearly a decade without them, the death penalty in the USA is supposed to be reserved for the "worst of the worst".[27] The mandatory death penalty has long been ruled unconstitutional in the USA, and the capital sentencing decision is supposed to be individualized, with the jury being able to take into account any mitigating evidence and the prosecution presenting the reasons why the defendant should be executed rather than imprisoned. If the defendant refuses to allow any mitigating evidence, even when compelling evidence of childhood abuse or mental disability is available, and goes so far as to demand the death penalty, does the system's accommodation of this demand not come perilously close to constituting a quasi-mandatory death sentence? It is certainly one where the sentencing authority did not take into account the background and circumstances of the defendant to weigh against the facts of the crime and the government's bid for a death sentence. As a US Supreme Court Justice said in such a case in 1979,

> "We can have no assurance that the death sentence would have been imposed if the sentencing tribunal had engaged in the careful weighing process that was held to be constitutionally required in *Gregg v. Georgia* and its progeny. This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after a painstaking review of aggravating and mitigating factors. In this case, that assumption has proved demonstrably false. Instead, the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death."[28]

While James Karis has not waived his appeals, there are numerous other death row inmates around the country who continue to do just that. Some change their minds. Others do not, and their death wish is fulfilled by a state all too willing to see freedom of choice for such individuals carried through to its lethal conclusion. For example, Tennessee death row inmate Christa Pike dropped her appeals in 2001, and faced an execution date in August 2002 before changing her mind. A county judge ruled that she was too late to change her mind, but the

[26] *People v. Deere* (1985). This was later overruled in *People v. Bloom* (1989). See, Anthony J. Casey, *Maintaining the integrity of death: An argument for restricting a defendant's right to volunteer for execution at certain stages of proceedings*. American Journal of Criminal Law, Volume 30, pages 75-106 (2002).

[27] "Within the category of capital crimes, the death penalty must be reserved for 'the worst of the worst'." *Kansas v. Marsh*, US Supreme Court, 26 June 2006, Justice Souter dissenting (joined by Justices Stevens, Ginsburg & Breyer).

[28] *Lenhard v. Wolff*, 444 U.S. 807 (1979), Justice Marshall dissenting. The case involved Jesse Walter Bishop, who waived his appeals and was executed in Nevada's gas chamber on 22 October 1979, three weeks after the Supreme Court refused to intervene.

Tennessee Supreme Court eventually overruled that decision. At a hearing in early 2007, a court heard evidence of the alleged abuse to which she was subjected as a child and of her mental illness, including bipolar disorder. In neighbouring Kentucky, Marco Allen Chapman, whose case is currently under automatic review, has claimed that he will continue to waive his appellate rights. He pleaded guilty at his 2004 trial, waived his right to present mitigating evidence, and asked for the death penalty.

Thirty years ago, dissenting against the US Supreme Court's refusal to stop the execution of Gary Gilmore, Justice Thurgood Marshall argued that without appellate review "an unacceptably high percentage of criminal defendants would be wrongfully executed – 'wrongfully' because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protections by the State".[29] Given the rate of reversible error found in capital cases – not just as a result of mandatory review but also discovered during subsequent state and federal appellate proceedings – if the more than 120 "volunteers" executed since 1977 had pursued their appeals, there is a significant possibility that a number of them would have had their death sentences overturned to prison terms. To look at it another way, the phenomenon of "volunteers" contributes to the arbitrariness that riddles the use of the death penalty in the USA.

The US Supreme Court has not passed a constitutional rule requiring mandatory review of state death sentences. Nevertheless, as of the end of 2005, of the 38 US states with capital statutes, 37 provided for automatic review of all death sentences, regardless of the defendant's wishes. Such review is usually conducted by the state's highest appellate court.[30] In most of the states, the law also requires review of the inmate's conviction as well as sentence, although not in Idaho, Montana, Oklahoma, South Dakota and Tennessee. In Indiana and Kentucky, a defendant can waive review of the conviction. In Virginia a defendant can waive an appeal of trial court error but cannot waive proportionality review. Only in South Carolina does the defendant have the right to waive any review if he or she is deemed competent to do so.[31] In addition, federal death row inmates do not get an automatic review.[32]

[29] *Gilmore v. Utah*, 429 U.S. 1012 (1977), Justice Marshall dissenting.

[30] Only issues in the trial record – such as rulings made by the trial judge – are reviewed on direct appeal. Matters outside the record – such as the withholding of evidence by the prosecutor or the failure of the defence lawyer to present particular evidence – are presented via *habeas corpus* appeals. After the US Supreme Court ruled in 1984 that proportionality review is not a constitutional requirement, most state high courts reduced such review to a "perfunctory exercise". See *USA: The experiment that failed – A reflection on 30 years of executions, January 2007,* http://web.amnesty.org/library/Index/ENGAMR510112007.

[31] *State v. Torrence* (1996).

[32] The information in this paragraph is taken from *Capital Punishment 2005*, US Bureau of Justice Statistics, December 2006.

The different ways in which the different states deal with the question of "volunteers" adds to the inconsistencies of the US death penalty.[33] A study published in 2002 noted that although most states prohibit death row inmates from waiving automatic review of their case, few states have restrictions at other stages of the capital process, including trial proceedings.[34] The study found that two states, New York and Arkansas, prohibited a defendant from entering a guilty plea if the prosecution was seeking the death penalty.[35] Only New Jersey prohibited the waiver of mitigating evidence.[36] New Jersey, through its Supreme Court, was also the only state to restrict waivers on post-conviction appeals beyond the initial automatic review.[37]

The general absence of prohibitions on pleading guilty or on waiving the presentation of mitigating evidence means that while "almost every state requires an appellate review of the trial proceedings…, very few states require that the trial proceedings actually occur. Oddly the *review* of the trial occupies a position of greater importance than *the trial itself*".[38] As such, the accused murderer in effect is allowed to "waive society's interest in fair and consistent application of the ultimate punishment of death".[39]

A degree of arbitrariness would also be indicated if a death row prisoner were to be prematurely executed after waiving appeals, and soon afterwards a new rule of constitutional law emerges from which he or she would have benefited. In May 2000 in Pennsylvania, for example, the execution of a brain-damaged inmate, Joseph Miller, was stayed 48 hours before it was due to be carried out after he allowed a federal appeal to be filed on his behalf. He had earlier waived his appeals. He had reportedly first indicated a desire to be executed after prison staff took away the crayons he had used to draw pictures to send to his children. He had later attempted suicide by overdose on anti-depressant medication. In December 2002, his death sentence was commuted to life imprisonment in the wake of the US Supreme Court's decision in *Atkins v. Virginia* prohibiting the execution of people with mental retardation.

[33] Under international law, the USA is a single state. The federal structure of government does not absolve the USA of its treaty obligation to ensure the non-arbitrary application of the death penalty, while working towards its abolition.
[34] Anthony J. Casey, *Maintaining the integrity of death: An argument for restricting a defendant's right to volunteer for execution at certain stages of proceedings.* American Journal of Criminal Law, Volume 30, pages 75-106 (2002).
[35] New York's death penalty statute has since been struck down by the state's high court, and to date no new statute has been enacted.
[36] In *State v. Hightower* in 1986, for example, the New Jersey Supreme Court overturned the death sentence in a case where the defendant had prevented the presentation of mitigation evidence. In January 2007, a study commission into New Jersey's death penalty recommended abolition. See: *USA: New Jersey Death Penalty Study Commission recommends abolition*, 3 January 2007, http://web.amnesty.org/library/Index/ENGAMR510032007. New Jersey has conducted no executions since 1977. At the time of writing, the state legislature was considering abolitionist legislation.
[37] *New Jersey v. Martini* (1996). ("It is self-evident that the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty").
[38] Anthony J. Casey, *Maintaining the integrity of death, op.cit.*
[39] *Ibid.*

The execution of people with serious mental illness remains to be prohibited in the USA, and constitutional protections for this category of defendants is minimal. Incompetence is a difficult burden to meet, whether it is incompetence to waive legal counsel or appeals or incompetence for execution.[40]

Indiana death row inmate Joseph Corcoran was set an execution date in July 2005 after waiving his appeals and being found competent to do so despite his serious mental illness, including paranoid schizophrenia. Before the execution was carried out, he changed his mind and took up his appeals. On 9 April 2007, a federal judge overturned his death sentence on the grounds that his constitutional rights had been violated in 1999 when the prosecutor offered to withdraw pursuit of the death penalty if Corcoran waived his right to a jury trial. The federal judge concluded that Joseph Corcoran should be re-sentenced, without the death penalty being an option for re-sentencing.[41] The state indicated that it would appeal the federal judge's ruling. At the time of writing, it remained to be seen if the state would be successful in its bid to keep Corcoran on death row and, if it were, whether Corcoran would in the future assist the government in killing him.

Evidence of mental disorder is common among "volunteers". Stephen Vrabel, for example, was executed in Ohio in July 2004 after waiving his appeals. He had originally been found incompetent to stand trial because of his severe mental illness, and was committed for five years to a maximum security psychiatric hospital where he was forcibly medicated. Subsequently brought to trial, he was sentenced to death after presenting no mitigating evidence, and was executed after waiving his appeals.[42]

In Joseph Corcoran's case, at a hearing in 2003 to determine his competency to waive his appeals, the state acknowledged that Corcoran suffers from mental illness. The defence presented three experts – a forensic psychiatrist, a clinical psychologist, and a neuro-psychologist – who had each separately evaluated Corcoran and reviewed his records. All three concluded that he was unable to make a rational decision to waive his appeals. They stated that the symptoms of his schizophrenia included recurrent delusions that the prison guards were torturing him through the use of an ultrasound machine, and that he was saying things without knowing and that this was causing people to be angry with him and mock him. Such delusions, the experts concluded, were causing him to hasten his execution in order to be relieved of his suffering. They were unanimous that his thought processes could not be described as rational or logical and that he was therefore incompetent to make the decision to drop his appeals.

Joseph Corcoran himself testified at the hearing, saying that the reason he wanted to waive his appeals was that he was guilty of murder, and "I should be executed. That is all

[40] *USA: The execution of mentally ill offenders*, January 2006, *op. cit*.
[41] *Corcoran v. Buss*, Opinion and Order, US District Court, Northern District of Indiana, Judge Allen Sharp, 9 April 2007.
[42] Three Ohio Supreme Court Justices dissented against the court's affirmation of his death sentence. Given Vrabel's mental illness, they took the view that he did not fall into the category of the "worst of the worst" crimes and offenders for which the death penalty is supposed to be reserved under US law. *USA: The execution of mentally ill offenders*, January 2006, *op. cit*., pages 74-76.

there is to it." He appeared to have a good understanding of the legal status of his case, and that the result of not pursuing his appeals would be execution. Yet at the same time, he was suffering a delusional illness. In December 2003, the trial court ruled that he was competent to waive his appeals, and this decision was upheld by the Indiana Supreme Court in January 2005. One of the five Justices dissented, agreeing with the view of the three mental health experts that because of Corcoran's delusions, his decision-making could not be described as rational. Justice Rucker pointed out that according to the expert testimony, far from faking his mental illness, Corcoran was trying to downplay it, and that the more time one spent with him, the more "you begin to understand how his thought process is a little bit skewed. And, in fact, the deeper you go, the more skewed it appears. And you can begin to understand how he might feel that execution might be preferable to life as he currently experiences it." Justice Rucker agreed, stating that although "Corcoran is a man of considerable intelligence and expressive powers…the fact that he offers what otherwise might be considered a rational explanation for his decision to die is itself intricately related to his mental illness".

The determination of mental health is an inexact science. Establishing whether a defendant is competent to waive his or her appeals will inevitably, as in so many other areas of capital life-or-death decision-making, result in errors and inconsistencies, at least on the margins.

Judicial action in Bobby Wilcher's case gave an added twist to the inconsistencies of US capital justice. Wilcher's mental illness and the effect of prison life on it may have contributed to his decision to drop his appeals in 2006. He suffered from bipolar disorder and spent 22 years on death row in Mississippi. In recent years, conditions on Mississippi's death row have been severely criticized, including in relation to the psychological impact of these conditions and the poor mental health care provided. In May 2003, a federal judge ruled that the conditions in the State Penitentiary offended "contemporary concepts of decency, human dignity and precepts of civilization which we profess to possess". Among other things, he found that the filthy conditions impacted on the mental health of inmates; the probability of heat-related illness was high for death row inmates, particularly those suffering from mental illness who either did not take appropriate steps to deal with the heat or whose medications interfere with the human body's temperature regulation; the exposure to the severely psychotic individuals was intolerable; the mental health care provided to inmates was "grossly inadequate"; and the isolation of death row, combined with the conditions on it and the fact that its population are awaiting execution, would weaken even the strongest individual.

On 24 May 2006, Bobby Wilcher, who had shown suicidal tendencies even before being subjected to such conditions of confinement, filed a motion in court seeking to drop all his remaining appeals and to allow the state to execute him. Six weeks later, however, he contacted his lawyer and told him that he had changed his mind and wished to pursue his appeals. On 10 July, the US Court of Appeals for the Fifth Circuit dismissed Wilcher's request to reinstate his appeals and refused to stay the execution. In a shocking opinion, the court stated that "this sudden about-face strikes us as nothing more than an eleventh-hour death row plea for mercy finally elicited from Wilcher by Counsel; the accompanying affidavit states only a conclusional flip-flop by Wilcher…" Other Circuit Courts of Appeal

have reinstated appeals in such cases, including of inmates who have changed their minds on numerous occasions on whether or not to drop their appeals. In a case in 2000, the Seventh Circuit Court of Appeals stated that "not only the defendant but society as a whole has a particularly strong interest in the regularity of proceedings that are followed; there is no un-doing a sentence of death once it is carried out". As the Nebraska Supreme Court ruled on 2 May 2007 in Carey Moore's case, stopping his execution despite the fact that he had dropped his appeals, "in deciding whether to exercise our inherent power, we are mindful of the especial concern that is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." In Bobby Wilcher's case, the courts refused to provide a remedy, and he was executed on 18 October 2006.

Robert Comer – Execution scheduled for 22 May 2007, Arizona

Fifty-year-old Robert Comer, who has been on death row for nearly 20 years, has given up his appeals. Arizona has not carried out an execution since November 2000. His would be the fifth execution of a "volunteer" in Arizona out of a total of 23 executions in the state since 1977.

Robert Comer was convicted in 1988 of the first-degree murder of Larry Pritchard, who was shot and stabbed on 3 February 1987 at a campsite in Apache Lake, Arizona. Comer was also convicted on charges of kidnapping, assault, and sexual assault in the case of two other campers, Jane Jones and Richard Smith. Robert Comer's friend, Juneva Willis, who originally faced the same charges as Comer, pleaded guilty to one count of kidnapping in exchange for her testimony against him. The other charges against Willis were dropped.

Robert Comer appeared in court briefly at the beginning of the guilt phase of his trial. He then waived his presence for the rest of the proceedings. After seven days of evidence, a jury found him guilty on all counts. During closing argument, the prosecutor repeatedly referred to him as a "monster" and "filth", and also called him a "reincarnation of the devil", comparing the crimes to a horror film. This demonization has continued post-trial. In 2001, the prison authorities, who claimed that Robert Comer was the most dangerous prisoner in its custody, contacted a local television station with a view to broadcasting a story about the risks posed by death row inmates, particularly Comer. A film crew was escorted through the prison facility, correctional staff were interviewed, and Comer was filmed without his consent. Two segments about him were subsequently broadcast which, according to a federal judge, described Comer "as Arizona's Hannibal Lecter, a fictional cannibalistic serial killer".[43]

On the day of his sentencing in 1988, Robert Comer had barricaded himself in his cell. Arizona law requires that the defendant be present for sentencing, and for the court appearance he was forcibly extracted from the cell, including reportedly being beaten with a fire hose. At the sentencing Robert Comer was shackled to a wheelchair and, except for a towel around his waist, he was naked. "His body was slumped to one side and his head drooped toward his shoulder. He had visible abrasions on his body. After asking both the

[43] *Comer v. Stewart*. Amended opinion, US District Court for the District of Arizona, 16 October 2002.

court deputy and a prison psychiatrist whether Comer was conscious, the state trial judge sentenced him to death."[44]

In 2006, two judges in a three-judge panel of the US Court of Appeals for the Ninth Circuit concluded that Comer's treatment during sentencing "shocks the conscience and warrants reversal of his sentence." They stated that:

> "The appearance of this naked, bleeding, shackled man was a severe affront to the dignity and decorum of the judicial proceedings. We have never before read of a man being sentenced to death, or even presented to a court, under such circumstances… If the court's formal dignity is a reflection of the importance of the matter at issue, then preservation of that dignity is most important when deciding whether a man lives or dies. The sentencing of Comer without such dignity or decorum is unacceptable…
>
> We cannot conceive of any reasonable justification…for escorting a naked and bleeding defendant into a courtroom for a capital sentencing hearing. We hold that Comer's due process rights were violated when he was sentenced while shackled, nearly naked, bleeding, and exhausted… When life and death are at stake, subjective considerations such as the humanity and dignity of a defendant will always influence the sentencing decision, whether it is made by judge or jury… Comer is entitled to a new sentencing hearing".[45]

One of the three judges dissented from what she described as the majority's "raw imposition of judicial power". Comer, she said, had already given up his appeals and had been found competent to do so. Judge Rymer stated that the appeals court "had no right to reach the merits" of Comer's case.[46] The case was taken by the full Ninth Circuit court, and in March 2007, the court overturned the panel decision, upholding the District Court's ruling that Comer was competent to waive his appeals (see below). Judge Pregerson, who had been in the earlier panel majority, dissented from this reversal by reprinting the 2006 opinion authored by Judge Ferguson, and adding a photograph of Robert Comer at his 1988 sentencing (below). Judge Pregerson added:

> "Nothing in this opinion requires the Arizona court to conduct a new penalty phase. The due process violation occurred *after* the guilt phase of the trial. The due process violation occurred *after* the penalty phase of the trial. The due process violation occurred at the sentencing hearing held by the Arizona trial judge who imposed the penalty of death on a man who was naked, bleeding, shackled, exhausted and semiconscious. Comer wants to die. Arizona wants to execute him. There is little question that this will happen. Judge Ferguson's opinion only requires that the sentence of death by pronounced to an understanding human, not to a discarded piece of flesh".[47]

[44] *Comer v. Schriro*, US Court of Appeals for the Ninth Circuit, 13 September 2006.
[45] *Ibid.*
[46] *Ibid*, Judge Rymer concurring in part and dissenting in part.
[47] *Comer v. Schriro*, Ninth Circuit Court of Appeals, 15 March 2007, Judge Pregerson dissenting.

Photograph of Robert Comer at sentencing reprinted from *Comer v. Schriro*, US Court of Appeals for the Ninth Circuit, 15 March 2007

Robert Comer had exhausted his state-level appeals in 1994, and in 1997 a District Court judge denied his first federal appeal. The case had then moved to the Ninth Circuit. In 1998, Robert Comer wrote to the state authorities that he no longer wanted to pursue his appeals. In 2000, the Ninth Circuit remanded the case to the District Court for an evidentiary hearing into the question of Comer's competence to waive his appeals, pointing to his history of irrational behaviour and the possible impact of his conditions of confinement on his decision. The court noted that "Comer describes the conditions of confinement in nothing short of Orwellian terms. He tells us that he is in 'sensory deprivation', has no access to legal materials, is permitted nothing in his cell, and must walk continuously for fear of becoming a 'veggie'." The Ninth Circuit noted its "grave concerns that a mentally disabled man may be seeking this court's assistance in ending his life".[48]

At the evidentiary hearing before District Judge Roslyn Silver, the defence expert testified that in his opinion Comer was suffering from a major depressive disorder, post-traumatic stress disorder, and SHU (Segregated Housing Unit) syndrome. The judge reviewed Comer's past and current conditions of confinement. Between 1979 and 1984, Comer had been incarcerated in California, including in various SHUs for some two and a half years.

[48] *Comer v. Stewart*, US Court of Appeals for the Ninth Circuit, 6 June 2000.

During this time, class action litigation had established that conditions in these SHU's were appalling, with debilitating effects on the physical and psychological health of the inmates. Prisoners were confined often for 24 hours a day to small dirty cells, with minimal furnishing, lacking adequate heating and ventilation, served by "antiquated and inadequate plumbing", and infested by rodents and insects. Contact with relatives and friends were denied or obstructed, and access to health care was poor.

In the isolation unit at Folsom prison, for example, the unit was filled day and night with "unrelenting, nerve-racking din", and "unceasing racket" which exerted "a profound impact" on the inmates, contributing to difficulty sleeping and affecting their mental health. In a 1987 letter, Robert Comer recalled the following about confinement at Folsom:

> "I remember the four walls. Grey walls. They always seemed to move in on you. Always going to squish the life out of you. The one dingy hole in the floor for shitting and pissing. It always smelled.... I remember in the winter you would lay there and shake yourself to sleep. Summer it was so hot you just wanted to die.... I remember.... feeling my mind shut down, 1 piece at a time.... I used to mess with the rats. I never could figure out how they got in. At night they would crawl on you.... I used to talk to the rats at first. After 4 months they talked back. You think your [sic] going crazy, so you don't talk with the rats no more.... Your head plays a song for you. Over and over and over and over and....After 6 or 7 months, all your mind could say (was) fuck you."

As a result of the class action lawsuit, the court in question found "abhorrent conditions" in the units, including a lack of basic hygiene, lighting and heating. At Robert Comer's competency hearing, Judge Silver found that it was "undisputed that Mr Comer endured most, if not all and possibly worse, of these deplorable conditions" while he was confined in the Californian facilities.

After Robert Comer's arrest in Arizona for capital murder, he was held in pre-trial custody in Maricopa County Jail, where he was held in a single cell for 24 hours a day. He reported an incident where he had asked a jail officer to loosen his handcuffs, but the officer had responded by tightening the handcuffs and raising Robert Comer's hands behind his back. It was the Maricopa County jail authorities who forcibly removed him from his cell for the sentencing.

A few months after he was sent to death row, Robert Comer was placed in administrative segregation for disciplinary infractions. He has been held in Special Management Units (SMUs) ever since. Between 1989 and 1996 he was held in SMU I and from 1996 in SMU II, both at the Eyman complex of the State Prison in Florence, Arizona. Robert Comer reported that on one occasion in SMU I, he was subjected to inverted four-point restraint, in which he was shackled, hands and feet, to a board and then inverted with his feet above his head at about a 45 degree angle facing downward for several hours.

Judge Silver noted that the physical layout of SMU I and SMU II "do not materially differ". Two levels of cells "extend like spokes from an elevated central control booth. At the end of each spoke, or pod, is an outdoor recreation area measuring twelve feet by twenty feet

with high concrete walls and floors and cyclone [wire mesh] fencing over the top." According to information received by Amnesty International,

> "SMU inmates live alone in a cell measuring approximately 7 by 11 ½ feet. They are isolated from any substantial contact with other inmates, officers or any living thing. The cells have no windows. Neither the door of the cell – nor the portion of the cell facing the hallway – has any bars through which an inmate can reach his hands. They can only see outside their cell through a metal grid punctuated by small holes measuring ½ inch in diameter to a view of a gray cement hallway wall. The other walls, floor and ceiling are uniform, unpainted gray cement. They are not allowed to ornament their cell walls in any fashion; there are no posters, pictures or graffiti on the walls. The cells of the other inmates in the pod all face the same direction so that none of the inmates can see each other from their cells... This design of the unit and the cells creates an excruciatingly alienating and isolating environment and, aside from brief periods in which inmates recreate and shower alone in other concrete tombs, they spend every living moment in these cells."

On the question of the prison conditions to which he had been subjected over the years, Judge Silver found that it was "undisputed that Mr. Comer was subjected to some physical brutality and abuse while incarcerated that no human being should be made to endure for any length of time. The Court has no difficulty concluding that this abuse would shock even a person with hardened sensibilities; and that even a cold-eyed critic of any disapproval of prison administration would agree that these forms of corporal punishment ran afoul of the Eighth Amendment."

In addition, Judge Silver stated, "Undeniably, some people do not have the mental health and the adaptive skills to tolerate segregated housing and will immediately, or inevitably develop psychiatric illnesses when housed in these units. Mr. Comer, however, has developed the means to cope with the conditions, and he exercises the initiative to ensure that he maintains his mental health while housed in them." She ruled that his conditions of confinement had left him with no mental disorder and that although "his conditions have had some effect on his decision, they have not had a substantial effect nor have they rendered his decision involuntary". She agreed with the court-appointed expert who "confirmed that Mr. Comer's decision was a mature one that has come from introspection. She testified that he regrets what he did; he realizes that he has hurt many people in his life; and he's made the decision that the punishment awarded for the crime is just and he's ready to participate in it."

Judge Silver revealed that she had "anguish[ed] over [her] decision" and "ultimately over the question of whether any healthy person, choosing between being and not being, could ever freely choose the terrifying ignorance of what may follow death, over enduring the ordeal of life." However, she stated that despite her "original hesitation to accept as rational Mr. Comer's chosen course, it is now clear to the Court that his decision is a rational one." She emphasized that "what is most important to Mr. Comer is that he has the opportunity to

choose. He has made a competent and free choice, which is merely an example of doing what you want to do, embodied in the word liberty. He should be afforded that choice".[49]

In Arizona, an inmate sentenced to death prior to 23 November 1992, can make a further choice – whether to be killed by lethal gas or lethal injection (inmates sentenced after that date are put to death by lethal injection). On 17 April 2007, the Arizona Supreme Court set 22 May as Robert Comer's execution date. It duly stated that "Robert Comer shall have the choice of either lethal injection or lethal gas". If he fails to choose, "the penalty of death shall be inflicted by lethal injection."[50] At the time of writing, Amnesty International did not know if Robert Comer had made a choice of execution method.

The Arizona Department of Corrections describes the procedures for carrying out an execution by gas as follows:

> "One (1) pound of sodium-cyanide is placed in a container underneath the gas chamber chair. The chair is made of perforated metal which allows the cyanide gas to pass through and fill the chamber. A bowl below the gas chamber contains sulfuric acid and distilled water. A lever is pulled and the sodium-cyanide falls into the solution, releasing the gas. It takes the prisoner several minutes to die. After the execution, the excess gas is released through an exhaust pipe which extends about 50 feet above Death House."[51]

In the case of Donald Harding, executed in Arizona's gas chamber in 1992, death was not pronounced until 10 and a half minutes after the cyanide tablets were dropped. During the execution, Harding reportedly struggled violently against the restraining straps for some six and a half minutes. In 1996, the US Court of Appeals for the Ninth Circuit wrote of California's use of lethal gas as an execution method:

> "[A]n inmate probably remains conscious anywhere from 15 seconds to one minute, and . . . there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time,... inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of 'air hunger' is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an exquisitely painful contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain."[52]

The Arizona Department of Corrections describes its lethal injection procedures as follows:

[49] *Comer v. Stewart*. Amended opinion, In the US District Court for the District of Arizona, 16 October 2002.
[50] *State v. Comer*. Warrant of execution, Supreme Court of Arizona, 17 April 2007.
[51] http://www.azcorrections.gov/adc/prisons/florencehist.asp.
[52] *Fierro v. Gomez*, US Court of Appeals for the Ninth Circuit, 21 February 1996.

> "Inmates executed by lethal injection are brought into the injection room a few minutes prior to the appointed time of execution. He/she is then strapped to a Gurney-type bed and two (2) sets of intravenous tubes are inserted – one (1) in each arm. The three (3) drugs utilized include: Sodium Pentothal (a sedative intended to put the inmate to sleep), Pavulon (stops breathing and paralyzes the muscular system) and Potassium Chloride (causes the heart to stop). Death by lethal injection is not painful and the inmate goes to sleep prior to the fatal effects of the Pavulon and Potassium Chloride." [53]

Over the past several years, there have been ongoing legal challenges concerning the constitutionality of lethal injections across the USA. The claim has generally been that in this three-chemical combination used by most states, if the sodium pentothal is ineffective for some reason, the second drug pancuronium bromide (pavulon) would mask outward signs that the inmate was conscious and in pain from the injection of the second and third chemicals. In December 2006, for example, a federal district court judge, after he had undertaken "a thorough review of every aspect" of California's lethal injection protocol, ruled that that state's "implementation of lethal injection is broken". Judge Jeremy Fogel had found evidence that in 6 of 13 executions carried out in California, the condemned man's "breathing may not have ceased as expected". This and other evidence raised concern that "inmates may have been conscious when they were injected with pancuronium bromide and potassium chloride, drugs that the parties agreed would cause an unconstitutional level of pain if injected into a conscious person". Judge Fogel found "a number of criticial deficiencies" in California's lethal injection procedures, including inadequate training and supervision of the execution team, inconsistent and unreliable record-keeping, poorly designed facilities and inadequate working conditions.[54]

While Judge Fogel's decision caused a suspension in executions in California while the executive responded to the findings, the responses of different states and different courts to this issue has introduced another level of arbitrariness into the US death penalty. In May 2006, for example, five federal judges noted that: "The dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result."[55] A federal judge in Ohio subsequently noted that the lack of rationale for denying or granting stays of execution on the lethal injection issue "does not promote confidence in the system, does not promote

[53] http://www.azcorrections.gov/adc/prisons/florencehist.asp.
[54] *Morales v. Tilton*, Memorandum of intended decision; Request for response from defendants. US District Court for the Northern District of California, 15 December 2006.
[55] Alley v. Little, US Court of Appeals for the Sixth Circuit, Judge Martin dissenting from denial of rehearing en banc (joined by Judges Daughtrey, Moore, Cole and Clay).

consistency in court decisions, and does not promote the fundamental value of fairness that underlies any conception of justice."[56]

"As a practical matter", Judge Fogel wrote in the California case, "there is no way for a court to address Eighth Amendment issues in the capital context other than in a case raised by a death-row inmate". [57] The phenomenon of "volunteers" – refusing to challenge potentially unconstitutional execution procedures – can only add to this inconsistent patchwork of official responses to this issue, in the absence of action by legislative or executive authorities to halt all executions.

Christopher Newton – Execution scheduled for 23 May 2007, Ohio

Christopher Newton, aged 37, is due to become the 26th prisoner to be executed in Ohio since judicial killing resumed there in February 1999. He would be the seventh of them to be put to death after waiving their appeals. Thirty years ago, George F. Solomon wrote:

> "The close linking of suicide and murder is seen in the mechanism of seeking to be killed, to be punished for one's own transgressions, particularly for one's murderous feelings… [M]any criminals leave clues, need to confess, and seek punishment… [M]urder can be committed either consciously or unconsciously in order to be killed by the state".[58]

Four decades ago, already in prison for a crime he said he committed in order to be sentenced to death, but unable to summon up the courage to commit suicide, James French murdered his cell mate. He asked for a death sentence and this time received one. He was executed in Oklahoma on 10 August 1966. Three decades later, Robert Smith, serving a life prison term in Indiana, stabbed a fellow prisoner to death. He fired his lawyers, refused a plea agreement of 50 years imprisonment and threatened to kill again unless he was given the death penalty. He was executed in 1998 after refusing to appeal, thereby achieving his stated aim of not growing old in prison.

Christopher Newton, from a troubled family background of dysfunction and abuse, came into conflict with the law from a young age. Then, between the ages of 13 and 15, he attended a school for children with severe behavioural or emotional problems. A clinical psychologist who assessed him after has described his childhood as "disruptive, chaotic, abusive, and identity-damaging". He has a history of suicide attempts and self-mutilation.

In 1999, already in prison on a burglary conviction, Christopher Newton told a mental health professional that he was going to kill an inmate so that he could spend the rest of his life in prison. In 2001, he killed his cell mate Jason Brewer. He called a guard to the cell, Newton reportedly told him that he knew that he would die in prison and that he hoped to be sentenced to death. In 2002, one year on from the murder, a prison psychiatrist reported that

[56] *Cooey v. Taft*, U.S. District Court for Southern District of Ohio, 6 December 2006.
[57] Although see Nebraska Supreme Court intervention in the case of Carey Moore, below.
[58] George F. Solomon, *Capital punishment as suicide and as murder*, reprinted in *Capital punishment in the United States*, H. Bedau and C. Pierce eds (1976). Quoted in Strafer, *Volunteering for execution, op.cit.* p. 864.

Christopher Newton had made a party hat to celebrate the anniversary of the crime, and that he appeared happy. The following month, Newton was transferred to another unit due to concerns that he was suicidal.

At Christopher Newton's murder trial in 2003, he pleaded guilty and presented no evidence. He waived his appeals, and did not seek clemency. Indeed, he stated that if his sentence was commuted to life, he would "kill again". The parole board unanimously voted for execution. In a recent interview from death row, Christopher Newton stated "I'm for the death penalty". He recalled that he had refused to cooperate with authorities investigating his case unless they made clear to "the prosecutor that I want the death penalty". He said: "You don't want to spend your life in a hell hole. Nothing against the prison system, but it's not the funnest [sic] place to be".[59]

As history repeats itself, as it does with tragic regularity in death penalty cases, state officials must begin to question what sense there is in diverting huge resources to a policy that offers no measurable benefits.

Elijah Page – Execution scheduled for the week of 9 July, South Dakota

Elijah Page was sentenced to death in 2001 for the kidnapping, torture and murder of 19-year-old Chester Allan Poage in 2000. South Dakota has not carried out an execution for 60 years.

Chester Poage was killed on 13 March 2000 near the town of Spearfish in the rural west of South Dakota. His body was found a month later, and after an autopsy it was determined that he had died of stab wounds and blunt force injury to the head. Three young men were charged in his murder: Darrell Hoadley, Briley Piper and Elijah Page, who were 20, 19 and 18 years old respectively at the time of the crime.

The three were tried separately. Briley Piper pleaded guilty, waiving his right to trial and sentencing by jury, and was sentenced to death by a judge on 19 January 2001. Elijah Page did the same and was condemned to death by the same judge on 16 February 2001. Darrell Hoadley pleaded not guilty and was tried by jury. The jurors found him guilty of the same crime with the same aggravating factors (factors making the crime eligible for the death penalty) as had been found in the cases of Elijah Page and Briley Piper. The jury was split on the question of punishment and Darrell Hoadley was sentenced to life imprisonment without the possibility of parole in May 2001.

In January 2006, the state Supreme Court upheld Elijah Page's death sentence. Two of the five Justices dissented (as they also did in Piper's case), stating: "Based primarily on untested, un-cross-examined and self-serving statements by Hoadley, Piper and Page, the circuit court and the majority opinion comes to the conclusion that Piper and Page were more culpable and less remorseful than Hoadley, and therefore more deserving of death. In a stunning reversal from its argument in the Hoadley case, the State now argues that Hoadley is less culpable in this horrendous crime than Piper and Page… In fact, the State charged Hoadley, Piper and Page with identical acts, conduct and charges, all resulting in identical convictions. The same aggravating factors were alleged and found against all three… There

[59] *A death row Republican*. The Other Paper (Columbus, Ohio), 3 May 2007.

are no meaningful differences to justify life for Hoadley and death for Piper and Page." The dissenting Justices concluded that all three "should receive life in prison without the possibility of parole for their substantially identical acts of murder".

Like many on death row in the USA, Elijah Page's childhood was one of deprivation and abuse. According to reports, from when he was two years old living with his siblings and his drug-addicted mother in abandoned buildings in Kansas City, Missouri, his mother would allow people to sexually molest him in exchange for drugs. When he was about seven years old, his mother lost custody of the children because of the abuse, violence and deprivation to which they were being exposed. The state placed the children in the care of their stepfather, but the abuse and deprivation persisted. Taken into state care again when he was about 13, for the following year Page lived in more than a dozen foster homes and ran away on numerous occasions. By the age of 14 or 15, psychiatric assessments recorded that he was displaying aggressive and anti-social behaviour. By the time he drifted to South Dakota in 1999 at the age of 17, he had a history of time spent in juvenile detention facilities, including as a result of burglaries and car thefts. Sentencing him to death for the murder committed in 2000 at the age of 18, the judge acknowledged to Elijah Page that "your early years must have been a living hell. Most people treat their pets better than your parents treated their kids".

With the subject of the treatment of pets in mind, it should be noted that a recent study on lethal injection procedures in the USA found that "the methods for euthanizing animals require substantially more medical consultation and concern for humaneness that the techniques used to execute human beings".[60] A federal judge also recently noted in a Tennessee case that "monitoring consciousness is a regular part of the standard of care in many states for euthanizing dogs and cats", but not in the executions of human prisoners. He also noted that the state "protects dogs and cats from the risk of excruciating pain in execution, but not death row inmates".[61] In addition a recent medical study on the subject of lethal injection in the USA notes the following:

> "In the United States and Europe, techniques of animal euthanasia for clinical, laboratory, and agricultural applications are rigorously evaluated and governed by professional, institutional, and regulatory oversight. In university and laboratory settings, local oversight bodies known as Animal Care and Use Committees typically follow the American Veterinary Medical Association's guidelines on euthanasia, which consider all aspects of euthanasia methods, including drugs, tools, and expertise of personnel in order to minimize pain and distress to the animal. Under those guidelines, lethal injections of companion or laboratory animals are limited to injection by qualified personnel of certain clinically tested, Food and Drug Administration–approved anesthetics or euthanasics, while monitoring for awareness.

[60] Deborah W. Denno. *The Lethal injection quandary: How medicine has dismantled the death penalty*. Fordham University School of Law (Working Paper), May 2007, available at http://ssrn.com/abstract=983732.

[61] *Workman v. Bredesen*, US Court of Appeals for the Sixth Circuit, 7 May 2007, Judge Cole dissenting.

> In stark contrast to animal euthanasia, lethal injection for judicial execution was designed and implemented with no clinical or basic research whatsoever. To our knowledge, no ethical or oversight groups have ever evaluated the protocols and outcomes in lethal injection."[62]

As already noted above, legal challenges to lethal injection protocols in various states around the USA are continuing, arguing that this execution method does not guarantee the "humane" killing its proponents claim for it. About four hours before Elijah Page was due to be put to death on 29 August 2006, Governor Mike Rounds of South Dakota ordered a stay of execution until after 1 July 2007 on the grounds that there was a discrepancy between the state's law on lethal injection and the method that was about to be used to kill Elijah Page. State law, last revised in 1984, required that two chemicals be used to execute the prisoner – "a lethal quantity of ultra-short-acting barbiturate and a chemical paralytic agent". However, the state correctional department's lethal injection policy involved a third chemical, potassium chloride, as used in most states in the USA.

On 23 February 2007, Governor Rounds signed into law a bill passed by the state legislature, under which the law becomes more general rather than more specific, under which the legislature "delegates nearly all power, giving the warden considerable control", and under which the state "retreated into greater secrecy, illustrating the tendency for states to withhold when constitutional challenges appear threatening."[63] The new law provides that:

> "The punishment of death shall be inflicted within the walls of some building at the state penitentiary. The punishment of death shall be inflicted by the intravenous injection of a substance or substances in a lethal quantity. The warden, subject to the approval of the secretary of corrections, shall determine the substances and the quantity of substances used for the punishment of death. An execution carried out by intravenous injection shall be performed by a person trained to administer the injection who is selected by the warden and approved by the secretary of corrections. The person administering the intravenous injection need not be a physician, registered nurse, licensed practical nurse, or other medical professional licensed or registered under the laws of this or any other state. Any infliction of the punishment of death by intravenous injection of a substance or substances in the manner required by this section may not be construed to be the practice of medicine. Any pharmacist or pharmaceutical supplier is authorized to dispense the substance or substances used to inflict the punishment of death to the warden without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law."

This becomes law on 1 July 2007. The following week, Elijah Page is due to become the first person killed under it, and the first person executed in South Dakota since George Stitts was put to death in the electric chair on 8 April 1947. In the intervening 60 years, more than 100 countries have abolished the death penalty in law or practice.

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[62] *Lethal injection for execution: chemical asphyxiation*? PLOS Medicine, Vol. 4, Issue 4, April 2007, http://medicine.plosjournals.org/archive/1549-1676/4/4/pdf/10.1371_journal.pmed.0040156-L.pdf.
[63] Denno, *The Lethal injection quandary, op. cit,* page 30.

In 1969, the last time South Dakota was preparing to execute a prisoner, Thomas Whitehawk, then Governor Frank Farrar commuted his death sentence to life imprisonment. Governor Rounds should do the same thing today, and prevent his state from taking the backward step of resuming executions. This would be consistent with his second inaugural address of 6 January 2007, when he said that "Our obligation is to make this state, this country and our world a better place".

Daryl Holton – Tennessee, execution date requested by state Attorney General

Daryl Keith Holton, aged 45, was sentenced to death in Tennessee in 1999 for the murder of his three young sons and their half-sister in 1997. He has effectively waived his appeals, although he has characterized his approach as one of "selective procedural default". On 4 May 2007, the state Attorney General requested that the Tennessee Supreme Court set an execution date.

On 30 November 1997, Daryl Holton walked into a police station in Shelbyville, Tennessee, to report a "homicide times four". There were no police officers present at the time, so the dispatcher radioed for assistance. Holton duly waited, and when a police officer arrived, told him that he had shot and killed his four children. Daryl Holton spontaneously placed his hands behind his back so that the officer could handcuff him and continued to relate to the officer, without being questioned, the details of his crime. He said that he had shot the children in his uncle's car repair garage with a semi-automatic rifle. The police went to the garage and found the bodies of Stephen Edward Holton (12), Brent Holton (10), Eric Holton (6) and Kayla Marie Holton (4). Daryl Holton said that he had considered committing suicide after the shooting, but decided to go to the police instead. His reasoning was that if people were to understand what had happened, "then you're going to have to talk to somebody that was involved. I am the only on that was involved that is still living. I am going to tell you the truth". In the first week of his pre-trial custody, he was put on suicide watch.

At his trial, the defendant's ex-wife and mother of the four children, testified that she and Holton had met in 1984 when he was stationed with the US army in South Carolina. He had joined the army in 1981 at the age of 19. He was subsequently transferred to Germany, then back to the USA (Georgia). He served in the first Gulf War after which he volunteered for service in Saudi Arabia while his family stayed in Georgia. Soon after the birth of the couple's third child in 1991, Ms Holton's care of the children came to the attention of the Georgia police and social services. Daryl Holton took an emergency leave of absence and returned to the USA. He moved the family to his father's home in Shelbyville. After he returned to Saudi Arabia, his wife moved to South Carolina, leaving the children in the care of her father-in-law. According to a later social services case report, "according to Mr Holton, not only has [his ex-wife] abandoned the children in 1992, but that [her] own mother apparently abandoned her as a child".

Daryl Holton returned from the Middle East, the couple divorced, and he took custody of the children. He obtained an honourable discharge from the army in order to be with his children, and moved with them to Tennessee. He took them to visit their mother in South Carolina two to three times each month. In 1993, his ex-wife gave birth to a fourth

child, Kayla Marie, by another man. She testified that he took to the news of the pregnancy "rather well" and he suggested that the new child take the Holton name. During the pregnancy she and Daryl began living together again in Shelbyville, and lived together for the next two years with the four children.

At the trial, Ms Holton said that she drank heavily during this period, and that he became violent towards her in response to her drinking. She and the children eventually moved out of the home. A court granted him visitation rights at weekends. She testified that her ex-husband was concerned about the crime rate in the neighbourhood in which she and the children were living, and about the condition of their home. She continued to drink heavily. One night in 1995, when Daryl Holton was returning the children home at the end of a weekend, he refused to allow them to get out of his car. He demanded that she join them in the vehicle. She refused and informed the police. He handed the children over to the police. After the murders two years later, he would tell the police that he had considered killing his children on that occasion but "couldn't do it". A social services assessment of Daryl Holton in 1995 noted his "fear of losing his relationship with his children", documenting his responses such as "the happiest time is spent with my children"; "my nerves are numb after 1 month without my children"; and "my mind is on hold until my children return".

Daryl Holton's visits with the children continued until the late summer 1997 at which point his former wife obtained a protective order against her ex-husband, and moved to a different address. Daryl Holton did not see the children again until 30 November 1997. His visit with the children on that day had been arranged after his ex-wife had contacted him two days earlier. He recalled that the children "all came up and hugged me", and that he took them to a McDonald's restaurant and an amusement arcade before driving them to his uncle's garage. He told the police that "we just told each other we missed each other". At the garage, he said that he left the two youngest children playing while he took the two older boys to the rear where he told them, with the promise of a surprise, to stand one behind the other with their backs to him. This, he told the police, was in order to be able to shoot them both through the heart with a single shot. He said that he followed up with multiples shots to ensure that they were dead. He then repeated this with the two younger children. The autopsies supported his version of events. Daryl Holton told the police that "the kids had been taken away from me and given back to me, taken away from me and given back to me enough".

At the conviction phase of his trial, three mental health experts – two presented by the defence and one by the prosecution – all agreed that Daryl Holton was suffering from a major depressive disorder at the time he killed the children. Evidence was also presented, although disputed, that "acute and chronic" carbon monoxide poisoning – from a propane heater in his uncle's garage where he had been working and sleeping – may have had an exacerbating effect on his depression.

One of the defence experts, a psychiatrist, testified that filicide is closely associated with the occurrence of major depression, and in such cases the parent is "on the sickest end of the spectrum. They have very severe major depression. It is often one with psychotic features [where] the individual's grasp of reality is severely lacking…This is a severe illness. About 20 per cent of these people will kill themselves". He stated that the "paradox is that these

individuals get so depressed that they can't see their life is worth living and they also see the same thing for their loved ones…They actually get delusional…These people will often feel a considerable sense of relief actually when their children are dead instead of having the usual and expected reaction… They actually feel better than they had while they were worrying about their kids". A 1998 medical report from when Daryl Holton was in pre-trial custody noted that Holton was "surprised that he is not experiencing any grief… He states that he dreams about his children and what they used to do, mainly pleasant dreams".[64]

The defence psychiatrist also testified that Daryl Holton had a family history of suicide, and the defendant himself had experienced several previous episodes of major depression, dating back to high school and continuing through his military career. A month before the crime, Daryl Holton had expressed a desire to commit suicide.

In similar vein, the prosecution's mental health expert stated that "my bottom line is this: I believe that Mr Holton at the time of this crime suffered from major depression". He agreed "absolutely" that severe depression can "affect one's judgment and thought processes" and cause delusions. The state expert's report noted Holton's history of depression and other mental health problems. For example, Holton presented at a Veterans Hospital in July 1994 with symptoms of anxiety and depression, and suicidal thoughts. A psychologist who examined him at that time suggested that he had symptoms of Post Traumatic Stress Disorder. In August 1994, he was diagnosed at the Veterans Hospital with severe depression. In 1995, he was again seen at the hospital, complaining that he had suffered headaches since returning from the Gulf.

The state's expert concluded that despite his illness, Daryl Holton could tell right from wrong at the time of the crime. After 50 minutes of deliberation, the jury rejected the defence of not guilty by reason of insanity and convicted Daryl Holton on four counts of first-degree premeditated murder. The trial immediately moved into a sentencing stage. Against the advice of his lawyers, Daryl Holton decided to largely forego the presentation of mitigating evidence at the sentencing phase, except testimony that he was a cooperative

[64] On 4 November 1997 in Arkansas, four weeks before Daryl Holton killed his children, Christina Riggs, who came from a family with a history of mental illness and suicidal tendency, killed her two young children. She then attempted to commit suicide, but survived. At her trial, a psychiatrist and a psychologist testified that her actions were the result of severe depression. They gave their opinion that, to her, the children's deaths were an act of love and an extension of her own suicide. The psychologist said: "The pathological suicidal depression that she was in.... effectively precluded her from being able to do something more reasonable, something more appropriate. From the outside looking in, the death of two children like this is pretty horrible. From the inside looking out, it looks like an act of mercy." For the state, a psychiatrist and a psychologist did not dispute that her suicide bid was genuine, but testified that they did not believe that she was sufficiently depressed to justify the defence of not guilty by reason of mental impairment. The jury agreed and convicted her of capital murder after less than an hour of deliberation. At the sentencing, Christina Riggs refused to have any evidence presented on her behalf and asked the jury for a death sentence. Having been granted her wish, she then refused to appeal her sentence. She was executed in May 2000. See *USA: The execution of mentally ill offenders*, January 2006, *op. cit*., pages 119-120.

inmate in the local jail who received visits from relatives. The jury voted that he should be executed.

There has been a degree of dispute about whether Daryl Holton intended to waive the entirety of his appeals after the Tennessee Supreme Court affirmed his convictions and death sentence in 2004. In any event, the effect has been that he has waived his appeals, and he has been found competent to do so.

In April 2005, the defence lawyers filed an appeal in state court, signed by them but not by Holton, adding in an affidavit that he had refused to meet with them. The lawyers raised concerns about Holton's mental competency, and claimed that he was "quite possibly operating under suicidal motivations". The lawyers requested a competency hearing. The trial-level court granted a stay of execution, ordered Holton to meet with his lawyers and a court-appointed mental health expert, and allowed additional time for the filing of "a completed post-conviction petition". The state appealed, and in May 2006 the Tennessee Supreme Court found that the trial-level court had lacked the authority to consider the petition filed on behalf of Daryl Holton because he had not signed it and the lawyers had failed to establish a "next friend" basis on which to proceed. It also found that the petition had been filed too late.[65]

The state requested that the Tennessee Supreme Court set a new execution date, and on 15 May 2006, Daryl Holton himself filed a response stating that he "does not oppose the State's motion to reset an execution date". Execution was set for 19 September 2006.

Meanwhile, Holton's lawyers petitioned the federal courts on his case, and raised questions about his competency. They provided an affidavit from another attorney who had met with Holton on numerous occasions between 16 May and 28 August 2005. She stated:

> "During my many visits with Mr Holton, he has not articulated a rational understanding of his legal position and his available options. In fact, he has exhibited an irrational understanding of key legal issues relevant to his case – what are valid constitutional claims available to him, what procedural bars may apply, and what potential remedies are available. Despite repeated efforts, I have been unable to get him to engage in a rational conversation about his legal options."[66]

In another affidavit, the psychiatrist who had testified at the trial suggested that Holton's major depression had likely recurred and that "any decision to volunteer for execution would fit the depressive pattern of thinking characteristic with [this illness]".[67] A third affidavit was provided by a psychiatrist who had recently interviewed Daryl Holton and reviewed his records. He formed a "preliminary opinion that Mr Holton suffers from complex Post Traumatic Stress Disorder and Depression", and concluded that there was reasonable cause to doubt that the prisoner was competent to waive his appeals. He further stated that "Mr Holton's obsessive qualities and military training have the potential to create an

[65] *Holton v. State* and *Reid v. State*, Supreme Court of Tennessee, 4 May 2006.
[66] Affidavit of Kelly A. Gleason, 1 September 2006.
[67] Affidavit of William D. Kenner, III, M.D., 6 July 2005.

emotional strait jacket as well. His academic prowess should not be confused with rationality, particularly when the potential for severe mental illness, the disruption of his mood, is the issue, rather than his cognitive abilities.[68]

The state sought to dismiss the petition filed by the lawyers, and Daryl Holton stated that he had not authorized the petition and did not wish to proceed with it. The federal District Court appointed a psychologist to evaluate Holton's competence to waive his appeals. Questioned at a hearing on 31 July 2006, Daryl Holton said that "I'm satisfied with the finding of the state court's jury and the sentence of death. I believe that the death sentence is appropriate for the crime which I was convicted [sic]. I just don't have a problem with it. We could continue in the court or judicial process for a number of years and still arrive at the same result". On 5 September 2006, the court-appointed psychologist testified that, in his opinion, Daryl Holton was "fully rational" and "especially informed of his legal options". He further stated that Holton was "not overborne by guilt, delusion, or irrational thinking. He is not a 'death row volunteer'. His adjustment to death row has been as good as one could expect". The psychologist also stated that Daryl Holton "described himself as not being depressed, but being frustrated at times by what he called do-gooders who are – this is in his words, but impinging would be my word, on what he describes as, you know, his autonomy and right to, in his words, be the captain of his own ship". The District Court judge ruled that there was no reasonable cause to believe that the prisoner was incompetent and so there was no reason to have a full competency hearing. He dismissed the petition filed by the lawyers as unauthorized.

The day before his execution, the US Court of Appeals for the Sixth Circuit issued a stay. It stated that this was an "appropriate" course of action, because an appeal written by Daryl Holton himself had just been filed in the US Supreme Court, seeking a stay of execution and raising a claim of ineffective trial and appellate counsel. In his petition, Daryl Holton said that he did not oppose the death penalty for crimes such as those of which he had been convicted, but that if his claims of his "unconstitutional convictions" were successful, it was his "understanding" that "the resulting death sentences must also be set aside".[69] In its response to Holton's petition, the state – supportive of the prisoner's views when he was waiving appeals, but opposing him when he was apparently seeking to stop his execution – filed a brief in the Supreme Court seeking dismissal of Holton's appeal on the grounds that it had been filed too late and was procedurally defaulted because his claims had not been raised in state court. The Supreme Court, without comment, refused to lift the Sixth Circuit's stay of execution.

In its order issuing the stay, the Sixth Circuit had instructed Daryl Holton to inform it personally whether he intended to pursue his appeal, and if so, whether he intended to do that himself or through his lawyers. Holton responded in a handwritten letter to the court, dated 21 September 2006, that he could not "at this time, in good faith" pursue the appeal filed by his

[68] Affidavit of George W. Woods, Jr., 27 July 2006.
[69] *Holton v. Bell*, Original petition for writ of habeas corpus, In the US Supreme Court, 16 September 2006.

lawyers as it challenged his own competency to waive federal review of the claims they were raising.

The state appealed to the Sixth Circuit to affirm the District Court's ruling dismissing the lawyers' original petition that had not been authorized by Holton, and arguing that "Holton's every word and deed demonstrate his competence. And because his *is* competent, there can be only one outcome: the petition must be dismissed since the district court's habeas jurisdiction was never properly invoked. This is so even if Holton were to express a change of heart at this stage. If the petition was not properly filed, it cannot be made so after the fact."[70]

On 9 January 2007, the Sixth Circuit affirmed the District Court's dismissal of the lawyer-filed petition. The state moved to have a new execution date set, and on 22 January, Daryl Holton wrote to the Tennessee Supreme Court in which he "acknowledges the State's difficulty and notes the delay caused by the extraneous, elective filings of third parties". In his response, Daryl Holton stated that his position had been one of "consistent, calculated, deliberate, and selective procedural default rather than one of wholesale waiver [of appeals]". He ended by stating that he did not oppose the state's motion to reset an execution date. The following week, the Tennessee Supreme Court set 28 February 2007 as the date on which Holton would be killed.

Condemned prisoners convicted in Tennessee of crimes committed before 1999 can choose between lethal injection and the electric chair. Daryl Holton chose the latter.

On 1 February 2007, Tennessee's Governor, Phil Bredesen, issued a statement noting that the state authorities had "identified deficiencies with our written [execution] procedures that raise concerns that they are not adequate to preclude mistakes". In order "to ensure that no cloud hangs over the state's actions in the future", he said, he issued an executive order suspending executions while the Department of Correction conducted a "comprehensive review" of Tennessee's execution procedures. Daryl Holton's execution was one of four stayed.

On 30 April, the Governor announced that the review had been completed and that the moratorium on executions would expire on 2 May. On 4 May, the Attorney General asked the Tennessee Supreme Court to set a new execution date for Daryl Holton, and on 14 May 2007 his handwritten response was filed in the Court stating that he "does not oppose the state's latest motion to reset an execution date". At the time of writing, a new date had not been set, and it was not known if Holton would adhere to his choice of death by electrocution.

The Department of Correction's report states that in the case of executions in Tennessee's electric chair, which has not been used since William Tines was put to death on 7

[70] *Holton v. Bell*, Final brief of respondent-appellee, In the US Court of Appeals for the Sixth Circuit, 29 September 2006. In 1993, in the case of a Nevada capital defendant, two US Supreme Court Justices had noted that "A person who is 'competent' to play basketball is not thereby 'competent' to play the violin…[A] monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose… The record in this case gives rise to grave doubts regarding… [the prisoner's] ability to discharge counsel and represent himself." *Godinez v. Moran*, 509 U.S. 389 (1993), Justice Blackmun, with Justice Stevens, dissenting.

November 1960, "electrocution equipment should be set to render 1750 volts at 7 amps, cycled on for 20 seconds, and on for an additional 15 seconds". The report states that the Department has tested the electrocution system "at least quarterly and has conducted regular maintenance as required".[71]

Carey Moore – Nebraska, execution stayed

Carey Dean Moore, due to be executed on 8 May 2007, had his execution blocked by the Nebraska Supreme Court on 2 May on the grounds of concerns about the constitutionality of the electric chair. Moore was sentenced to death in 1980 for the murder of two men in Omaha in August 1979. Carey Moore was aged 21 at the time of the crimes. He is now 49. He had given up his appeals. Nebraska has not carried out an execution for 10 years.

Carey Moore was convicted of killing taxi drivers Reuel Eugene Van Ness and Maynard Helgeland, both aged 47, after having called their cabs out to remote locations. His death sentence was overturned in 1990 by the US Court of Appeals for the Eighth Circuit on the grounds that one of the aggravating factors making the crime punishable by death – namely that it had shown "exceptional depravity" – was unconstitutionally vague. The case was subsequently remanded for re-sentencing. Despite a request by the state to redefine what was meant by "exceptional depravity", the Nebraska Supreme Court declined to do so. At the 1995 re-sentencing, the trial court therefore constructed its own definition of the term, under which a number of factors would be considered. This included whether there was "cold, calculated planning of the victim's death as exemplified… by the purposeful selection of a particular victim on the basis of special characteristics", including age. Because of evidence that Carey Moore had deliberately picked victims who were older than him, the three-judge panel decided that this constituted "exceptional depravity" and sentenced him to death.

In 2003, this issue split the Eighth Circuit. Seven judges upheld the death sentence, while six dissented. Noting that "Moore was truly without prior notice that age would become part of the 'exceptional depravity' calculus", the six dissenters argued that the re-sentencing court's "post hoc application of its newly-defined 'exceptional depravity' aggravator", had "left Moore in the unenviable position of trying to argue for his life without any idea of what would guide the panel's decision". Sentencing under such circumstances, they argued, "denies defendants due process in the most basic sense, for they have no prior notice of the law to be used against them". Four of the judges also added that "throughout the entirety of this case, one thing has remained static: neither the Nebraska Legislature nor the Nebraska Supreme Court has fashioned a death penalty sentencing scheme that provides the sentencing body with a cogent, meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not".

Carey Moore has been facing execution for more than a quarter of a century. The US Supreme Court has not ruled on whether prolonged confinement on death row violates the US Constitution, but individual Justices have raised concerns. In 1995, Justice Stevens wrote that

[71] Report on Administration of Death Sentences in Tennessee, Tennessee Department of Correction, April 2007.

executing a prisoner who had been on death row for 17 years arguably negated any deterrent or retributive justification for the punishment, supposedly the two main social purposes of the death penalty. If these goals no longer existed, he suggested, the outcome would be "patently excessive and cruel". In 1999, Justice Breyer expressed concern in Carey Moore's case (and the case of an inmate on Florida's death row for 24 years) at the "astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures". He suggested that "where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one." In 2002, in the case of a Florida inmate on death row for about 27 years, Justice Breyer stated that if executed, the prisoner would have been "punished both by death and also by more than a generation spent in death row's twilight. It is fairly asked whether such punishment is both unusual and cruel."

Nebraska is the only state in the USA which retains the electric chair as its sole method of execution. The state changed its method of electrocution in 2004 from a four-shock technique to a single 15-second shock of 2,450 volts. In April 2007, the Corrections Department revealed that the protocol had been changed again, to require a 20-second jolt of electricity. Under the new rules, there is a wait of 15 minutes before checking that the condemned inmate is dead. On 30 April, Nebraska Senator Ernie Chambers asked the state Supreme Court to suspend executions until it can review the execution protocol. In his letter to the Court, the Senator wrote:

> "This is a such a serious issue and this execution protocol is shrouded in so much confusion and uncertainty – and so likely, in my view, to result in a 'botched' execution – that this court must satisfy itself there is not going to be a shameful fiasco on May 8, of such proportion and notoriety as to engage the critical attention of CNN and the world."[72]

On 2 May 2007, the Nebraska Supreme Court blocked the execution. By four votes to three, it said that "on its own motion", it had reconsidered its order to issue a death warrant for Carey Moore. It had concluded that it had "acted prematurely" in ordering a death warrant before resolving the question of the constitutionality of the use of the electric chair, scheduled to be brought before the Court in another case in September 2007. The Court pointed out that "were we to conclude that electrocution is no longer constitutional, then we would have undeniably permitted a cruel and unusual punishment only a few months earlier. The damage to Moore, and to the integrity of the judicial process, would be irreparable… The purpose of a stay is to prevent a state from doing an act which is challenged and may be declared unlawful in a pending proceeding."

The Chief Justice of the Court was one of the judges who dissented from the order. He denounced the decision to issue a stay in the absence of a request from the condemned man. He stated that "we know of no case in which a court suspended a state's executions [without] a request for relief…by the condemned person". However, adopting a philosophy

[72] *Ernie Chambers asks Nebraska Supreme Court to suspend executions.* Omaha World-Herald, 30 April 2007.

that should be applied to all cases of "volunteers", the narrow majority held that despite the fact that Moore had waived his appeals, "we are nonetheless required to ensure the integrity of death sentences in Nebraska… Although we respect the defendant's autonomy, the solemn business of executing a human being cannot be subordinated to the caprice of the accused. We must adhere to our heightened obligation to ensure the lawful and constitutional administration of the death penalty, regardless of the wishes of the defendant in any one case".[73]

Conclusion: The punishment, not the prisoner, is the problem

Issuing its order in Carey Moore's case, the Nebraska Supreme Court suggested that "it is a natural reaction for some to wish to be rid of an admitted murderer who asks to be executed". Certainly, demonization goes hand in hand with a dehumanizing punishment. Just as torture involves the severing of bonds of human sympathy between the torturer and the tortured, so too those who are condemned must be separated from the rest of humanity to make their killing by the state tolerable to society. It is easier to torture or kill the dehumanized 'other'. For the prosecutor seeking Robert Comer's execution, the defendant was a "monster" and a "reincarnation of the devil". For the aunt of Christopher Newton's victim, the condemned man should be denied clemency because he is a "dark and evil man".[74] This is a sentiment commonly heard in capital cases, as prosecutors, politicians and others seek to justify resort to state killing. The anger and pain of relatives of murder victims is understandable. The absence of human rights leadership from politicians and prosecutors is regrettable.

Those on death row are not monsters, but human beings convicted of violent crimes which have caused immense suffering. Far from providing any constructive insight into the human propensity for violence, however, the state's policy of symbolic extermination merely yields to the same propensity. The cases of those defendants and prisoners who "volunteer" for the death penalty further highlight the cruel purposelessness of this anachronistic punishment, and add further arbitrariness to its application.

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[73] *Nebraska v. Moore*, Supreme Court of Nebraska, 2 May 2007. The Governor of Nebraska issued a one-line response to the stay of execution: "This unprecedented judicial activism leaves me speechless." *Gov. Heineman's Statement on Judicial Stay of Execution*, 3 May 2007, http://www.gov.state.ne.us/news/2007_05/05_execution_stay.html. In a speech on judicial independence a few days earlier, Carey Moore's lawyer (before Moore dropped his appeals) said: "Independent judges, beholden to no person or group, and no matter how powerful, provide the equal possibility of justice for the least desirable, the most odd, handicapped, weakened, friendless, eccentric, poor and marginalized people, the downtrodden in other words, as well as the few who hold positions of wealth, acclaim and power, in other words the uptrodden. All litigants are heard, and stand equal despite their rank, office, money or power… Activist judges, a code phrase for those who really do enforce the bill of rights as best they can, are commonly criticized by folks who think such rights are mere technicalities with no practical value. Sentences less than maximum draw much criticism and calls for removal, no matter what the reason for the sentence. These are real and frequent instances of attacks on the independence of the judiciary". Alan Peterson. Nebraska State Bar Foundation Law Day remarks, 30 April 2007, Lincoln, Nebraska. Copy on file with Amnesty International.

[74] State of Ohio, Adult Parole Authority, *In re: Christopher J. Newton*. Report, 16 February 2007.

When defendants seek death at their trials by preventing the presentation of mitigating evidence on their behalf, they are in effect being allowed to defeat the constitutional requirement for individualized sentencing in capital cases. Indecency is added to arbitrariness when people with serious mental health problems are sentenced and put to death, whether or not they waived their right to mitigation or their appeals. Even in cases where prisoners are found to have made a "rational" choice in "volunteering" for execution after years on death row, the coercive nature of the death penalty should not be ignored. The tragic irony is that a system that provides for execution is hardly likely to recognize that a condemned prisoner may end up believing that there is no other way for him or her to achieve a sense of autonomy, even dignity, than to side with the state in its pursuit of a punishment which, *per se*, offends commonly held notions of human dignity.[75]

In the end, the problem lies not in the inmate's request *per se*, but in the punishment sought, obtained and carried out by the state. "The cause of justice has championed over wrong", the Mississippi Commissioner of Corrections announced after Bobby Wilcher was executed on 18 October 2006 after the courts refused to reinstate his appeals. From Amnesty International's perspective, the commissioner and other proponents of the death penalty have the wrong view of justice.

To end the death penalty is to abandon a destructive, diversionary and divisive public policy that is not consistent with widely held values. It not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in social and psychological terms. It has not been shown to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim's family, and extends that suffering to the loved ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it.

Defendants and prisoners should not have the option of asking for execution, because the state should not have the option of imposing the death penalty at all.

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[75] The UN Human Rights Commission, for example, in repeated resolutions over the years, held that abolition of the death penalty "contributes to the enhancement of human dignity and to the progressive development of human rights".

Executions in the USA, 17 January 1977 – 17 May 2007

Jurisdiction	Total executions	'Volunteers'	% 'consensual'
* Connecticut	1	1	100%
* Idaho	1	1	100%
* New Mexico	1	1	100%
* Oregon	2	2	100%
* Pennsylvania	3	3	100%
* Nevada	12	11	92%
* Washington	4	3	75%
* Utah	6	4	67%
Kentucky	2	1	50%
Montana	3	1	33%
* US Government	3	1	33%
* Delaware	14	4	29%
* Indiana	18	5	28%
* Ohio	25	6	24%
* Maryland	5	1	20%
South Carolina	36	7	19%
Arizona	22	4	18%
* Illinois	12	2	17%
California	13	2	15%
Arkansas	27	4	15%
Florida	64	9	14%
Mississippi	8	1	12%
Alabama	36	4	11%
North Carolina	43	4	9%
Oklahoma	84	7	8%
* Virginia	98	8	8%
Texas	393	26	7%
Missouri	66	4	6%

Colorado	1	0	0%
Georgia	39	0	0%
Louisiana	27	0	0%
Nebraska	3	0	0%
Tennessee	3	0	0%
Wyoming	1	0	0%
Total	**1076**	**127**	**12%**

* = Jurisdictions which resumed judicial killing with the execution of a "volunteer"

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